Supreme Court, U. S.
FILED
MAR 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1041

EX PARTE: SHEARN MOODY, JR.

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

DRAYTON NABERS, JR.
WILLIAM A. ROBINSON
CABANISS, JOHNSTON, GARDNER, DUMAS & O'NEAL
1900 First National-Southern Natural Building
Birmingham, Alabama 35203
Attorneys for Respondent, Protective Life Insurance Company

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

## TABLE OF CONTENTS


| | Page |
|---|---|
| Table of Authorities | This page |
| Introduction | 1 |
| Statement of the Case | 5 |
| Argument | 7 |
| I. The Federal Questions Sought to Be Reviewed in This Court Were Not Properly Raised in the Court Below, and Are Not Worthy of Review by This Court | 7 |
| II. The Reasons Asserted by Petitioner for Granting the Writ Are Without Merit | 12 |
| A. The Contempt Proceeding Was Properly Instituted | 13 |
| B. Moody Was Not Denied the Right to Be Present | 14 |
| C. Moody's Argument Based on the Limitations Period Is Without Merit | 15 |
| D. Moody's Evidentiary Objections Are Without Merit | 16 |
| E. The January 6, 1975 Injunction Presents No Reason for Granting the Writ | 16 |
| Conclusion | 18 |
| Proof of Service | 18 |


## Table of Authorities

**Cases:**


| | |
|---|---|
| American Surety Company v. Baldwin, 287 U.S. 156 (1932) | 8 |

Blackmer v. United States, 284 U.S. 421 (1932) ....12, 13, 14
Bloom v. Illinois, 391 U.S. 194 (1968) ..... 12

Cardinale v. Louisiana, 394 U.S. 437 (1969) ..... 7
Codispoti v. Pennsylvania, 418 U.S. 506 (1974) ..... 12

Donovan v. Dallas, 377 U.S. 408 (1964) ..... 17
Durley v. Mayo, 351 U.S. 277 (1956) ..... 8

Gompers v. United States, 233 U.S. 604 (1914) .....12, 14
Griffin v. Illinois, 351 U.S. 12 (1956) ..... 13

Honeyman v. Hanan, 300 U.S. 14 (1937) ..... 8

Illinois v. Allen, 397 U.S. 337 (1970) ..... 14
International Brotherhood of Elec. Workers v. Davis Const. & Eng'rs, Inc., 334 So. 2d 892 (S.Ct.Ala. 1976) 15

Lewis v. United States, 146 U.S. 370 (1892) ..... 14
Lynch v. New York ex rel. Pierson, 293 U.S. 52 (1934) 8

Meyers v. United States, 264 U.S. 95 (1924) ..... 12
Michaelson v. United States, 266 U.S. 42 (1924) ..... 12
Missouri Pacific Railroad Company v. Hanna, 266 U.S. 184 (1924) ..... 8
Monks v. New Jersey, 398 U.S. 71 (1970) ..... 7
Moody v. State ex rel. Payne, 295 Ala. 299, 329 So. 2d 73 (1976) .....11, 17

Pendergast v. United States, 317 U.S. 412 (1943) ..... 15
Persons v. Summers, 274 Ala. 673, 680, 151 So. 2d 210 (1963) ..... 13
Pointer v. Texas, 380 U.S. 400 (1965) ..... 16

Taylor v. Hayes, 418 U.S. 488 (1974) ..... 12

Walker v. City of Birmingham, 388 U.S. 307 (1967) .... 17
Williams v. Kaiser, 323 U.S. 471 (1945) ..... 8



**Statutes:**

Title 13, § 9, Code of Alabama (1958 Recomp.) ..... 6

**Rule:**

Revised Rules of the Supreme Court of the United States, Rule 23(f) ..... 7, 8

**Other Authorities:**

Am.Jur.2d, Appearance § 24, at 498 (1962) ..... 13

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1041

EX PARTE: SHEARN MOODY, JR.

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

### INTRODUCTION

The Petition before this Court is the fifth in a series of petitions for a writ of certiorari filed in this Court by Shearn Moody, Jr. relating to the domicillary and ancillary receivership proceedings in the courts of Alabama and Texas involving Empire Life Insurance Company of America ("Empire"). Petitioner ("Moody") was the chief executive officer of Empire, an insolvent Alabama insurance company. Respondent is Protective Life Insurance ("Protective"), an Alabama insurance company that reinsured Empire's policies.

Moody's efforts to nullify the liquidation of Empire and the reinsurance of its insurance policies by Protective have produced

a virtually never-ending stream of litigation. His efforts have been uniformly unsuccessful. This Court has, to date, denied three of Moody's petitions for a writ of certiorari.[1] In addition to the Petition now before this Court, Moody has pending two other petitions for a writ of certiorari relating to Empire.[2] Citations of some of the reported decisions in this litigation are listed below:

*Moody v. State ex rel. Payne*, 12 Ala. Bar Rptr. 646, — So. 2d — (S. Ct. Ala. Feb. 3, 1978);

*Moody v. State ex rel. Payne*, 351 So. 2d 552 (S. Ct. Ala. Sept. 9, 1977);

*Moody v. State ex rel. Payne*, 351 So. 2d 547 (S. Ct. Ala. Sept. 9, 1977);

*Ex parte Shearn Moody, Jr.*, 351 So. 2d 538 (S. Ct. Ala. Aug. 19, 1977);

*Moody v. State ex rel. Payne*, 295 Ala. 299, 329 So. 2d 73 (1976);

*Moody v. State, ex rel. Payne*, 344 So. 2d 160 (1977);

*Moody v. State*, 520 S.W.2d 452 (Tex. Civ. App.—Austin 1975);

*Empire Life Ins. Co. v. State*, 492 S.W.2d 366 (Tex. Civ. App.—Austin 1973);

*Moody v. Crook*, 520 S.W.2d 958 (Tex. Civ. App.—Austin 1975);

[1] Petitions have been denied in: *Ex parte Shearn Moody, Jr.*, No. 76-1845, *cert. denied* 10/3/77, *reh. denied* 11/28/77; *Shearn Moody, Jr. v. Texas*, No. 77-571, *cert. denied* 12/5/77, *reh. denied* 1/16/78; *Shearn Moody, Jr. v. State of Alabama ex rel. Payne*, No. 77-428, *cert. denied* 12/12/77.

[2] *Shearn Moody, Jr., et al. v. Texas*, No. 77-873 (Pet. filed Dec. 16, 1977); *Shearn Moody, Jr. v. State of Alabama, ex rel. Payne*, No. 77-1109 (Pet. filed Feb. 7, 1978).



*Moody v. Jones*, 519 S.W.2d 536 (Tex. Civ. App.—Austin 1975);

*Day v. State*, 489 S.W.2d 368 (Tex. Civ. App.—Austin 1972, n.r.e.*);

*Moody v. Moody Nat'l Bank*, 522 S.W.2d 710 (Tex. Civ. App.—Houston 1975, n.r.e.);

*Moody v. Texas*, 538 S.W.2d 158 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e. 1977).

The Petition now before this Court seeks review of the decision of the Supreme Court of Alabama upholding two findings of criminal contempt against Moody by the Alabama receivership court.

A brief chronology of significant procedural developments in the Empire receivership proceedings before the Alabama courts provides the background for the criminal-contempt adjudications against Moody sought to be reviewed by the Petition now before this Court. Empire was placed in receivership by Order entered by the receivership court on June 29, 1972 (R. 35-38). Moody intervened in the receivership proceedings on October 12, 1973 (R. 39-48). On the petition of the Empire Receiver, the Commissioner of Insurance for the State of Alabama, the receivership court authorized the Receiver to advertise for and secure reinsurance for Empire. Moody objected to reinsurance and liquidation of Empire. Following a three-week trial, to which Moody and Protective were parties, on June 14, 1974 the receivership court authorized the Empire Receiver to accept a reinsurance proposal submitted by Protective. Moody perfected an appeal to the Supreme Court of Alabama. That court affirmed, *Moody v. State ex rel. Payne*, 344 So. 2d 160 (S. Ct. Ala. 1977). Moody petitioned this Court for a writ of cer-

* Indicates denial of review by the Texas Supreme Court upon a finding of "no reversible error" (n.r.e.).

tiorari, Case No. 77-428; the petition was denied by this Court on December 12, 1977. During the pendency of Moody's appeal to the Alabama Supreme Court from the receivership court's decree ordering liquidation and approving reinsurance with Protective, the Empire Receiver sought and secured an injunction from the receivership court prohibiting Moody from interfering with the Empire receivership proceedings. The injunction, which was entered January 6, 1975, enjoined Moody, *inter alia,* from filing—without the prior approval of the receivership court—any amendment in any pending action involving the receivership proceedings, the Receiver, or Protective. Moody appealed from the January 6, 1975 injunction to the Supreme Court of Alabama. *Moody v. State ex rel. Payne,* 295 Ala. 299, 329 So. 2d 73 (1976). That court affirmed, holding that "[t]he injunction was not only justified but was necessary to preserve the assets of Empire." 295 Ala. at 306, 329 So. 2d at 79. Moody did not seek review in this Court of the decision of the Alabama Supreme Court affirming the January 6, 1975 injunction. However, during the pendency of Moody's appeal from the injunction to the Alabama Supreme Court, an amended complaint was filed by Moody's lawyers in the case of *Allmon v. Bookout,*[3] which was then pending in the United States District Court for the Middle District of Alabama. The *Allmon* amended complaint sought a federal-court injunction prohibiting the liquidation of Empire and enjoining the consummation of the reinsurance agreement by the Empire Receiver and Protective; the *Allmon* amended complaint also sought that the federal court declare the state-court receivership proceeding "null and void" (R. 125-126). Immediately after the amended complaint in *Allmon* was filed, Protective instituted civil-contempt proceedings against Moody. By Order of April 30, 1975, Moody was adjudicated in civil contempt for having violated the January 6, 1975 injunction. Though Moody sought to have the civil-contempt adjudication vacated or stricken by the Alabama Supreme Court by extraordinary writ,[4] no ordinary appellate review was sought by Moody in the courts of Alabama. Moody sought indirectly to challenge the April 30, 1975 civil-contempt adjudication in this Court in case no. 76-1845; that petition for a writ of certiorari was denied by this Court on October 3, 1977. Shortly after the *Allmon* lawsuit was dismissed, the receivership court entered an Order, on June 16, 1976, which scheduled an evidentiary hearing to determine whether Moody had purged himself of civil contempt. The June 16, 1976 Order commanded Moody to appear in person at the evidentiary hearing on July 19, 1976. Moody failed to appear as ordered.

[3] *Allmon v. Bookout, et al.,* No. 74-377-N (M.D. Ala. 1974).



## STATEMENT OF THE CASE

The criminal contempt proceedings against Moody were instituted on August 19, 1976 on a petition filed by Protective (R. 1-20). Each of three attorneys of record for Moody were served (R. 7). On the basis of the petition, the receivership court issued four orders requiring Moody to appear and show cause why he should not be held in criminal contempt (R. 21-24). Moody was served, as directed by the court below, both by registered and regular mail. Moody filed a motion seeking a general continuance of the criminal contempt proceedings, but the receivership court determined that a general continuance was not warranted. A conditional continuance was granted, and upon its expiration the criminal contempt proceedings commenced on September 13, 1976. The trial court, *ex mero motu,* determined not to compel Moody's attendance at the hearing; rather the decision of whether to attend in person was left to Moody. The court below considered voluminous documentary evidence and oral testimony and left the evidence open at the

[4] S. Ct. Ala. No. 1221. The request for relief was denied May 6, 1975.

conclusion of the hearing on September 13, 1976 (R. 1681-62) to permit Moody to provide testimony in explanation or mitigation of the contempt charges against him. No testimony in explanation or mitigation was ever offered by Moody and, on November 1, 1976, the trial court below treated the evidence as being closed. Moody was found to be in criminal contempt on each of four separate charges. Pursuant to tit. 13, § 9 of the *Code of Alabama*, Moody was sentenced to imprisonment in the County Jail for four consecutive five-day terms and ordered to pay four fines, each in the amount of $50.

Moody filed four petitions for a writ of certiorari in the Supreme Court of Alabama seeking review of the criminal-contempt adjudications. On January 26, 1976 the Alabama Supreme Court granted certiorari. The decision of the Alabama Supreme Court is reported, *Ex parte Shearn Moody, Jr.*, 351 So. 2d 538 (1977), and a copy of the decision is included in the appendix to the petition before this Court (A1-A22). The majority of the Alabama Supreme Court reversed two of the adjudications. As to the other two charges of criminal contempt, the Alabama Supreme Court unanimously affirmed. Specifically, the Alabama Supreme Court affirmed adjudications that Moody was in criminal contempt (1) for having willfully disobeyed the Order and Injunction entered by the receivership court on January 6, 1975; and (2) for having willfully disobeyed the Order entered by the receivership court on June 16, 1976. This Petition for a writ of certiorari in this Court ensued.



## ARGUMENT

### I

**The Federal Questions Sought to Be Reviewed in This Court Were Not Properly Raised in the Court Below, and Are Not Worthy of Review by This Court.**

Rule 23(f) of the Revised Rules of this Court requires that a petition for writ of certiorari to a state court must demonstrate with specificity that the federal questions sought to be reviewed were appropriately raised in both the state court of first instance and the state appellate court.

> "(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

This rule embodies a long line of case authority holding that this court will not consider federal constitutional issues raised for the first time in a petition for writ of certiorari to review a state court decision. *E.g., Monks v. New Jersey*, 398 U.S. 71 (1970); *Cardinale v. Louisiana*, 394 U.S. 437 (1969);

*American Surety Company v. Baldwin*, 287 U.S. 156 (1932); *Missouri Pacific Railroad Company v. Hanna*, 266 U.S. 184 (1924). This Court has made it particularly clear that no jurisdiction to exercise review by certiorari exists unless the record affirmatively shows that the federal question was presented to the highest state court having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. *E.g., Durley v. Mayo*, 351 U.S. 277 (1956);*Williams v. Kaiser*, 323 U.S. 471 (1945); *Honeyman v. Hanan*, 300 U.S. 14 (1937); *Lynch v. New York ex rel. Pierson*, 293 U.S. 52 (1934).

The conspicuous failure of the Petition here to comply with the requirements of Supreme Court Rule 23(f) and, concomitantly, to establish a jurisdictional basis for consideration of the Petition is attributable to the fact that the purported federal questions Petitioner seeks to raise before this Court were never raised before the Supreme Court of Alabama. The Petition likewise does not specify the manner in which such federal questions were raised before the receivership court and does not quote specific portions of the record in substantiation.

It is absolutely clear from the face of Moody's petitions for writ of certiorari filed with the Alabama Supreme Court[5] that no federal issues were raised by Petitioner before the Alabama Supreme Court:

> "16. The issues presented for review by this petition are as follows:
>
> (a) Whether the trial court had jurisdiction to try and adjudicate the criminal contempt charge against the Petitioner without personal service upon him and personal jurisdiction over him.

[5] Each of the four petitions filed by Moody in the Alabama Supreme Court presented the same ten issues for review.



> (b) Whether the Petitioner could legally and properly be tried on the criminal contempt charge against him in his absence.
>
> (c) Whether the procedural rules governing criminal contempt proceedings are the Alabama Rules of Civil Procedure.
>
> (d) Whether the petition filed by Protective Life Insurance Company was an adequate basis for the institution of a criminal contempt charge against the Petitioner.
>
> (e) Whether the order to show cause issued to the Petitioner was adequate notice of the charges against him.
>
> (f) Whether the order to show cause and the petition on which it was based stated adequate legal grounds for a charge of criminal contempt.
>
> (g) Whether the prosecution of this criminal contempt charge against the Petitioner was barred by the statute of limitations.
>
> (h) Whether the trial court admitted illegal and incompetent evidence in the trial of this criminal contempt charge against the Petitioner.
>
> (i) Whether the evidence presented in support of this criminal contempt charge was sufficient to support a conviction of the same.
>
> (j) Whether a judgment finding an accused party guilty of criminal contempt may order the accused parties to pay attorneys' fees to the attorneys who prepared and prosecuted the contempt charges against him."

Petitioner has not demonstrated and, in fact, cannot demonstrate that the federal questions he seeks to have reviewed by

this Court[6] were timely raised and preserved in the state courts. For example, Moody's claims that he was denied equal protection of the laws and that his Fifth and Sixth amendments rights were violated are not even suggested by the issues presented by him for review by the Alabama Supreme Court. Accordingly, under the settled authorities established by this Court, this Court ought not assume jurisdiction to review the judgment of the Supreme Court of Alabama.

Even if it were assumed that the questions presented in the Petition had been properly raised in the state courts below, not one of them is worthy of review. Moody seeks to inject federal issues into the case for a review by this Court without attempting any showing that he was deprived of any federal right, privilege, or immunity. Six purported federal questions are sought to be

---

[6] For convenient reference, the questions presented in the petition filed with this Court are set out below:

"1. Whether a constructive criminal contempt prosecution in which the accused may be punished by imprisonment is a criminal case and subject to the constitutional requirements, guaranties, and privileges, applicable to all criminal cases.

2. Whether service of process on the accused in a state criminal contempt prosecution which is not made in compliance with state statutes specifying methods for service of process denies the accused equal protection of the laws.

3. Whether a defendant in a state criminal prosecution in which imprisonment is a permissible form of punishment may be tried in absentia.

4. Whether allowing the use as evidence in a state criminal contempt prosecution of (a) an involuntary deposition of the accused and (b) depositions taken in other cases and transcripts of hearings in other proceedings violates the accused's right against self-incrimination and right to confront the witnesses against him.

5. Whether the refusal by a state court to apply a uniform statute of limitations to criminal contempt prosecutions denies equal protection of the laws.

6. Whether a criminal contempt conviction in a state court may be rested on a state court injunction that has the effect of proscribing a civil action in the federal courts under 42 U.S.C., § 1985 and 28 U.S.C., § 1343."



injected. Petitioner seeks an advisory opinion that a criminal-contempt proceeding in the courts of Alabama ought to be called a "criminal case" (Question 1). Petitioner invites this Court to assume that the manner in which the criminal-contempt proceedings were initiated against him denied him equal protection of the laws (Question 2), though the Petition concedes that Moody was an active party to the receivership action pending in the Alabama trial court, and though the Petition does not challenge the Alabama Supreme Court's conclusion that the criminal-contempt proceeding was properly instituted in all respects. Without attempting any showing that he was denied the right to be present at the hearing on criminal contempt, petitioner seeks an advisory opinion that a defendant in such proceeding may not be tried *in absentia* (Question 3). Without challenging in any way the Alabama Supreme Court's conclusion that his evidentiary objections were moot, at least as regards the two findings of criminal contempt sought to be reviewed in this Court (Pet., A-19), Petitioner seeks review of sundry evidentiary issues (Question 4). Without even addressing the Alabama Supreme Court's conclusion that the two contempt charges sought to be reviewed here were timely brought (Pet., A-16) regardless of what limitation period is deemed applicable, Petitioner invites this Court to conclude that he was denied equal protection of the laws (Question 5) by that portion of the decision of the Alabama Supreme Court which adopted a flexible standard by which to measure the timeliness of bringing criminal-contempt charges (Pet., A-15). Finally, Petitioner attempts to inject a federal issue into the case by collateral attack upon the injunction entered against him by the Alabama receivership court on January 6, 1975, from which he successfully appealed to the Alabama Supreme Court, ***Moody v. State ex rel. Payne***, 295 Ala. 299, 329 So. 2d 73 (1976), and from which no timely review by this Court was ever sought (Question 6).

## II

**The Reasons Asserted by Petitioner for Granting the Writ Are Without Merit.**

Six reasons for granting the writ are asserted. First, Moody contends that the Supreme Court of Alabama erroneously relied on the decision of this Court in *Blackmer v. United States*, 284 U.S. 421 (1932). Moody urges that the writ of certiorari be granted to correct this alleged error and to resolve a purported conflict between *Blackmer* and the decisions of this Court in *Gompers v. United States*, 233 U.S. 604 (1914); *Michaelson v. United States*, 266 U.S. 42 (1924); *Bloom v. Illinois*, 391 U.S. 194 (1968); *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974), and *Taylor v. Hayes*, 418 U.S. 488 (1974). As the *Blackmer* case has never been questioned, much less overruled, by this Court, any reliance on *Blackmer* by the Supreme Court of Alabama was proper in every respect and provides no basis for granting the petition for a writ of certiorari. Moreover, *Blackmer* is demonstrably not in conflict with any of the decisions of this Court cited by Petitioner,[7] and such decisions certainly furnish no independent reason for granting the relief requested. The *Gompers*, *Michelson*, *Bloom*, *Codispoti* and *Taylor* cases are clearly distinguishable in that each of them deals only with an evolving application by this Court of the Sixth Amendment right to jury trial in "serious" criminal contempts. *See Annot.* 45 L. Ed. 2d 815, 821-25 (1976). Not even Moody contends that the two criminal contempt adjudications that he seeks to have reviewed by

[7] Indeed, *Blackmer* is cited with approval in *Bloom*, 391 U.S. at 205. *Blackmer* cites *Michelson* as supporting authority, 284 U.S. at 440. The *Blackmer* conclusion that criminal contempt is *sui generis* is quoted from the case of *Meyers v. United States*, 264 U.S. 95 (1924), in which this Court rejected the proposition that the *Gompers* case supported a claim that contempt proceedings amount to a prosecution for a criminal offense within the intendment of section 53 of the Judicial Code. The *Codispoti* and *Taylor* cases are progeny of *Bloom*, and, like *Bloom*, do not conflict with *Blackmer*.



this Court (each of which involves statutory punishment of five days in the county jail), are "serious" contempts for purposes of the right to trial by jury. As the Alabama Supreme Court's reliance on *Blackmer* was proper, and as *Blackmer* does not conflict with the cases cited by Petitioner, it is clear that Petitioner's first reason for granting the writ is without merit.

### A. The contempt proceeding was properly instituted.

Moody's argument that the method utilized to initiate the criminal-contempt proceedings against him had the effect of denying him equal protection of the laws is without merit. Moody was a party to the receivership action, and he entered a general appearance in the related criminal-contempt proceedings.[8] Each of three of his attorneys of record were served with the show-cause orders, together with all papers upon which they were based (R. 7). Moody himself was served both by registered and regular mail. He had actual knowledge of the criminal-contempt proceedings, and his attorneys participated actively in the hearing. The petition in this Court fails to make any showing that the methods of service denied him equal protection of the laws; that contention, moreover, was not raised at all in the lower courts. Moody has not and cannot point to any disparity in treatment by the State of Alabama, and this case does not present the slightest suggestion of invidious discrimination, such as that condemned in the only case cited by Moody, *Griffin v. Illinois*, 351 U.S. 12 (1956).

[8] Moody's motion for a continuance of the contempt proceedings constituted a general appearance under Alabama law. *Persons v. Summers*, 274 Ala. 673, 680, 151 So. 2d 210 (1963). See 5 AM. JUR. 2d, *Appearance* § 24, at 498 (1962).

B. **Moody was not denied the right to be present.**

Moody next argues that he was tried in his absence in violation of the Sixth Amendment. The cases relied upon by Moody do not support the proposition that the Sixth Amendment right of the accused in a criminal prosecution to be confronted with the witnesses against him is applicable in the Alabama criminal-contempt proceedings.[9] *Blackmer v. United States*, 284 U.S. at 440, squarely supports the proposition that a criminal-contempt proceeding may go forward in the absence of the alleged contemnor. As demonstrated *supra*, *Blackmer* is not at odds with the *Gompers-Bloom* line of cases. Ironically, the case which best supports Moody's contention that he had a right to be personally present at the hearing is the very decision of the Alabama Supreme Court that he seeks to overturn in this Court.

> "In this case, Moody was not denied the right to be present. Instead, every opportunity to be present was afforded the accused. . . . This is clearly a case where Moody had the right to be present, but waived that right by his actions."
>
> 351 So. 2d at 543
>
> (Pet., App. at A-14-15).

The petition does not and cannot show that the above conclusions of the Alabama Supreme Court were erroneous, for they are abundantly supported by the record.

---

[9] Moody asserts that the cases of *Lewis v. United States*, 146 U.S. 370 (1892), and *Illinois v. Allen*, 397 U.S. 337 (1970), support his argument that the contempt hearing in his absence violated the Sixth Amendment. Nonsense. The *Lewis* case involved an appeal from a murder conviction, not a petty contempt adjudication. Moreover, *Lewis* acknowledges that the rule that nothing shall be done in the absence of the prisoner has been relaxed, at least in misdemeanor cases. 146 U.S. 372. Finally, *Lewis* was effectively rejected by this Court in the only other case cited by Moody, *Illinois v. Allen, supra.*

> "The broad dicta in . . . Lewis v. United States, 146 U.S. 370 [36 L. Ed. 1011, 13 S. Ct. 136] (1892), that a trial can never continue in defendant's absence have been expressly rejected."

397 U.S. at 342.



C. **Moody's argument based on the limitations period is without merit.**

Moody next argues that the limitations standard applied by the Alabama Supreme Court denied him equal protection of the laws. The standard applied by the court below involves no disparity of treatment and no invidious discrimination. (Pet. A-15). In effect, Moody asks this Court to require that the State of Alabama apply its one-year limitations statute for misdemeanors to criminal-contempt proceedings, contrary to the manifest intent of the Alabama Legislature and the express holdings of the Supreme Court of Alabama that criminal contempt is not a misdemeanor within the meaning of the pertinent Alabama statutes. *E.g., International Brotherhood of Elec. Workers v. Davis Const. & Eng'rs, Inc.*, 334 So. 2d 892 (S. Ct. Ala. 1976). There is no basis in the record for this Court to wrest supervisory jurisdiction over inferior courts of Alabama from the Supreme Court of Alabama, and neither of the cases cited by Moody support such a result. This Court in *Gompers, supra*, and *Pendergast v. United States*, 317 U.S. 412 (1943)—the cases relied upon by Petitioners—construed a federal statute of limitations to govern criminal contempt; such cases in no way present an obstacle to the Alabama Supreme Court's construction of the Alabama statute of limitations for misdemeanors as not applying to criminal-contempt proceedings in the courts of Alabama.

Finally, as to the two contempt charges sought to be reviewed here, the Alabama Supreme Court found as facts that one was based on "continuing acts" by Moody which would extend *any* limitations period deemed applicable (A. 16), and the other charge was brought within one month of the occurrence of the contemptuous act (*Id.*). Thus any review by this Court of the standard of timeliness adopted by the Alabama courts would be merely advisory.

D. **Moody's evidentiary objections are without merit.**

Next Moody argues that certain documentary evidence was received in violation of his Fifth and Sixth Amendment rights. The evidentiary rulings of the Alabama trial court accorded Moody the full measure of his constitutional rights. At the time Moody submitted to the deposition challenged in this Court, he had been adjudicated in civil contempt on the basis of a plenary evidentiary hearing at which no constitutional rights were invoked. As regards the other challenged evidence, the Petition fails to show that the Sixth Amendment right to be confronted with witnesses was applicable to the contempt hearing, and no showing is or can be made that Petitioner did not have an adequate opportunity, through counsel, to cross-examine the witnesses.[10]

The disposition of Moody's evidentiary objections by the court below is unassailable in this Court for the independently sufficient reason that the Alabama Supreme Court determined that the evidentiary issues were moot (A. 19). As Petitioner does not challenge the mootness determination in this Court, the evidentiary issues are beyond review.

E. **The January 6, 1975 injunction presents no reason for granting the writ.**

Moody's final argument is that the contempt proceedings against him were based on an unconstitutional exercise of power by the Alabama courts. This argument addresses only one of

[10] *Pointer v. Texas*, 380 U.S. 400 (1965), does not support Moody's contention. *Pointer* did not involve petty criminal contempt; rather it dealt with review of an armed robbery conviction predicated on transcribed testimony of the victim of the robbery, which had been taken at a preliminary hearing. The victim's testimony identified Pointer as the man who had robbed him; Pointer was not represented by counsel at the preliminary hearing and did not cross-examine the victim.



the two contempt findings sought to be reviewed in this Court; the other finding is based on Moody's disobedience of the receivership court's order of June 16, 1976. The contention is that the January 6, 1975 injunction of the receivership court, which enjoined Moody from interfering with the receivership proceedings, is contrary to the case of *Donovan v. Dallas*, 377 U.S. 408 (1964). The January 6, 1975 injunction is beyond review by this Court. The injunction was entered over three years ago at the conclusion of a plenary hearing in the receivership court, at which Moody was represented by counsel. No objection was raised by Moody that the injunction was unconstitutional in any respect. Moody perfected an appeal to the Alabama Supreme Court where he raised for the first time the contention that the injunction was contrary to the *Donovan* case. A unanimous Alabama Supreme Court affirmed the injunction and specifically rejected the contention that the injunction was defective under *Donovan*. *Moody v. State ex rel. Payne*, 295 Ala. 299, 329 So. 2d 73 (1976). Moody sought no review in this Court of the affirmance of the injunction by the Alabama Supreme Court. Petitioner's belated collateral attack upon the January 6, 1975 injunction is baseless. Finally, even if it be assumed, *arguendo*, that the January 6, 1975 Injunction was invalid, Moody cannot avoid punishment for contempt after disobeying it. *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

## CONCLUSION

Based on the foregoing authorities and analysis, the petition is due to be denied.

Respectfully submitted,

DRAYTON NABERS, JR.

WILLIAM A. ROBINSON
CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL
1900 First National-Southern
Natural Building
Birmingham, Alabama 35203
(205) 252-8800
Attorneys for Respondent,
Protective Life Insurance
Company

### Proof of Service

Proof of service of three copies of Respondent's Brief in Opposition to Petition for a Writ of Certiorari upon all parties separately represented by counsel was filed by William A. Robinson, a member of the bar of the United States Supreme Court, with the Clerk of the United States Supreme Court on the same date the brief in opposition was filed.